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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BEVERLY NEHMER, et al.,
Plaintiffs,
v.
U.S. DEPARTMENT OF VETERANS
AFFAIRS,
Defendant.

CASE NO. 3:86-cv-06160 WHA

**STIPULATION AND ~~PROPOSED~~
ORDER TO MODIFY DEADLINE FOR
THE VA TO ISSUE REPLACEMENT
DECISIONS UNDER NOVEMBER 5,
2020 ORDER, ECF NO. 492, AND TO
SET OTHER VA OBLIGATIONS**

STIPULATION

Pursuant to Local Rule 6-2, Class Counsel, on behalf of Beverly Nehmer and the plaintiff class (“Plaintiffs”), and Defendant, the U.S. Department of Veterans Affairs (the “VA”), respectfully request that the Court modify the current July 3, 2021 deadline for the VA to issue replacement decisions for the veterans identified under the Court’s Order on Motion for Enforcement of Final Judgment, ECF No. 492, by extending that deadline to November 30,

1 2022, subject to several conditions concerning enhancement of the replacement decision process
 2 to which the parties have agreed. In support of this request, which pursuant to Local Rule 6-2(a)
 3 is accompanied by the Declaration of Thomas J. Murphy, the VA's Acting Under Secretary for
 4 Benefits, the parties stipulate and agree as follows:

5 1. On July 10, 2020, Plaintiffs filed a Motion for Enforcement of Final Judgment,
 6 seeking to compel the VA to readjudicate certain disability benefits decisions of Blue Water
 7 Navy veterans pursuant to the Final Stipulation and Order in this case filed on May 21, 1991.
 8 ECF No. 460. Following briefing and oral argument on Plaintiffs' Motion, the Court on
 9 November 5, 2020 issued its Order on Motion for Enforcement of Final Judgment (the "Order"),
 10 ECF NO. 492. In the Order, the Court granted Plaintiffs' Motion and ordered the VA to:

11 (1) identify, within 120 days of the date of this order, all of the *Nehmer*
 12 readjudication decisions made pursuant to the consent decree in which the VA
 13 denied compensation on the ground that the veteran was not entitled to the
 14 presumption of herbicide exposure because the veteran did not set foot on the
 15 landmass of Vietnam or serve in the inland waterways of Vietnam; (2) issue, within
 16 240 days of the date of this order, a replacement decision that determines: (a)
 17 whether the veteran served in the territorial waters of the Republic of Vietnam
 18 during the war and, if so, (b) the amount of retroactive compensation, if any, the
 19 veteran or the veteran's survivor (or, if the veteran or survivor is deceased, the estate
 20 of the deceased veteran or survivor) is entitled under the terms of consent decree;
 21 and (3) provide class counsel, pursuant to the Privacy Protection Order (see Dkt.
 22 Nos. 224, 446, 447), with a copy of (a) all of the *Nehmer* readjudication decisions
 23 identified, (b) all of the replacement decisions issued, and (c) each notice letter sent
 24 to the class members and coding sheet associated with such replacement decisions.

25 *Id.* at 10. Because the Order issued on November 5, 2020, the deadline to satisfy paragraph 1
 26 was March 5, 2021, and the deadline to satisfy paragraph 2 is July 3, 2021.

27 2. On March 5, 2021, the VA timely satisfied paragraph 1 of the Order by notifying
 28 Plaintiffs that it had identified "all of the *Nehmer* readjudication decisions made pursuant to the
 29 consent decree in which the VA denied compensation on the ground that the veteran was not
 30 entitled to the presumption of herbicide exposure because the veteran did not set foot on the
 31 landmass of Vietnam or serve in the inland waterways of Vietnam." *Id.* The VA also, as a
 32 courtesy and pursuant to the Privacy Act Protection Order in this case, provided Plaintiffs with a
 33 spreadsheet containing the name, VA claims file number, and Social Security number of each of
 34 the 60,492 veterans identified.

1 3. On March 5, 2021, the VA also notified Plaintiffs of its intent to request a
 2 modification of the July 3, 2021 deadline to perform paragraph 2 of the November 5, 2020
 3 Order, given the large number of *Nehmer* readjudication decisions the VA had identified, the
 4 limited resources available to the Veterans Benefits Administration, as well as constraints placed
 5 on the agency's adjudication processes by the COVID-19 pandemic. Thereafter, the parties
 6 exchanged additional correspondence and held multiple telephone conferences, including on
 7 April 5 and April 12, to discuss a potential extension request and potential enhancements of the
 8 VA's obligations under the November 5, 2020 Order.

9 4. Based on the large number of *Nehmer* readjudication decisions the VA identified
 10 on March 5, 2021 for which replacement decisions will need to be issued, the limited resources
 11 available to the VA to perform the readjudications, and constraints on evidentiary access
 12 imposed by the COVID-19 pandemic, the VA conveyed to Plaintiffs that it anticipates that it
 13 will require until the end of November 2022 to issue replacement decisions for the affected
 14 disability and death compensation claimants. The 120 days permitted by the Order is not
 15 sufficient time for the VA to issue replacement decisions for the more than 60,000 *Nehmer*
 16 readjudication decisions it identified on March 5, 2021, and to attempt to reallocate VA
 17 resources in an effort to meet that deadline would substantially affect the VA's overall mission
 18 to the detriment of other veteran populations. A detailed explanation of the severe constraints
 19 that the current July 3, 2021 deadline would impose and the limited VA resources and
 20 constraints that require extension of that deadline to November 30, 2022 is contained in the
 21 attached Declaration of Thomas J. Murphy.

22 5. Following the parties' productive meet-and-confer efforts, Plaintiffs and
 23 Defendant have consented to this request to extend the VA's deadline to issue replacement
 24 decisions to November 30, 2022, subject to the conditions described below.

25 THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between the
 26 parties, subject to approval by the Court, that:

1 1. The VA's deadline to issue replacement decisions pursuant to paragraph 2 of the
2 November 5, 2020 Order be modified and extended to November 30, 2022, under the conditions
3 set forth below;

4 2. In furtherance of its paragraph 2 obligations, the VA intends to devote at least
5 the same magnitude of resources to the process of issuing replacement decisions as the VA
6 devoted to adjudicating claims under the Blue Water Navy Vietnam Veterans Act of 2019;

7 3. The VA shall, beginning July 30, 2021, and every three months thereafter,
8 provide to Class Counsel (a) a quarterly report on the replacement decisions issued since the
9 previous report, (b) the documents specified in paragraph 3 of the November 5, 2020 Order for
10 those replacements decisions, (c) a document listing the VA claims file number of those cases
11 listed in the quarterly report in which a VA notice letter was not sent because the VA did not
12 then possess a current address to which to mail the notice letter; (d) notice letters sent by the VA
13 after the last quarterly report because the VA obtained a current address to which to send the
14 notice letter and (e) the information set forth in paragraph 6 below about payees whom the VA
15 has been unable to locate for purposes of making payment. The quarterly report shall include an
16 Excel spreadsheet containing, for each veteran or surviving family member for whom a
17 replacement decision has been issued, the following information:

18 a. The same information for that veteran or surviving family member
19 previously disclosed to Class Counsel on March 5, 2021 (that is, the
20 social security number of the living or deceased veteran; the VA claims
21 file number; the last, first and middle name of the veteran; and the date of
22 the veteran's death, if applicable);
23 b. The effective date for disability or death benefits awarded in the
24 replacement decision based on a presumptive condition. In the event a
25 disability claim involves more than one presumptive condition, the VA
26 will provide one date—the earliest effective date for all presumptive
27 conditions at issue in the disability claim;

- c. The full amount of the retroactive disability or death benefits awarded in any replacement decision that results in an increase in benefits awarded; and.
- d. The address to which the notice letter accompanying the replacement decision was sent, but only to the extent that the VA is able to populate the Excel spreadsheet on an automated basis. The VA will investigate the feasibility of an automated process to include on the spreadsheets provided with each quarterly report a column containing the address(es) on each of the notice letters for the VA's replacement decisions. If the VA determines that an automated process is feasible, it will so advise Class Counsel and provide the address information with each quarterly report. If the VA determines that an automated process is not feasible, it will so advise Class Counsel. Class Counsel agrees to accept in good faith the VA's determination of feasibility. Regardless of the VA's determination, the VA will continue to provide copies of all notice letters for replacement decisions to Class Counsel to satisfy paragraph 3 of the Order.

18 4. When, pursuant to paragraph 3 of the November 5, 2020 Order, the VA provides
19 Class Counsel “with a copy of (a) all of the *Nehmer* readjudication decisions identified, (b) all of
20 the replacement decisions issued, and (c) each notice letter sent to the class members and coding
21 sheet associated with such replacement decisions,” ECF No. 492, it will provide PDF copies
22 with Optical Character Recognition (“OCR”) to the maximum extent feasible. While the VA
23 anticipates the very large majority of documents provided will be capable of OCR, it has
24 advised, and Plaintiffs have acknowledged, that a limited number of documents, primarily
25 historical documents—for example, prior adjudication decisions dating back several decades in
26 some cases—are unlikely to be capable of OCR.

27 5. The VA shall send to each adjudicator it assigns to prepare a replacement
28 decision under the November 5, 2020 Order the operative guidance which the VA prepared in

1 2011 and included in its February 2012 and July 2016 revisions of the Nehmer Training Guide
 2 to implement Footnote 1 from the 1991 Final Stipulation and Order in this case. This guidance
 3 is currently referenced in the VA's Live Manual at Part IV, Subpart ii, Chapter 2, Section C,
 4 Topic 4(d).

5 6. The VA shall continue its practice of providing Class Counsel with information
 6 about unlocated payees—*i.e.*, those payees whom the VA has been unable to locate for purposes
 7 of making payment—by providing with each quarterly report the following, to the extent
 8 applicable, for an individual unlocated payee reported: VA claims file number; Social Security
 9 number; veteran's first name; veteran's last name; claimant's name (if different from veteran);
 10 undeliverable mail has been received; unable to identify a payee; unable to locate payee (payee
 11 identified, but no address available); type of mail returned (VCAA, rating, etc.);
 12 veteran/claimant's phone number; attempts made to obtain valid address; last known address;
 13 comments. By agreeing to provide this information to Class Counsel, the VA does not concede
 14 that any use of this information by Class Counsel to locate payees is compensable for purposes
 15 of any future request for attorney's fees and expenses.

16 7. On November 30, 2022, the VA shall provide an Undeliverable Report to Class
 17 Counsel. The Undeliverable Report, shall contain the information set forth below for each payee
 18 to whom the VA has either sent a check or transferred money by direct deposit for the amount of
 19 retroactive compensation owed to the payee as a result of a replacement decision and the check
 20 was returned to the VA as undeliverable or the VA receives notice that the direct deposit failed.
 21 The Undeliverable Report will include VA claims file number, Social Security number;
 22 veteran's first name; veteran's last name; payee name; reason for payment return, payment
 23 amount returned, date of return, and address of payment (if sent by mail).

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2 DATED: May 12, 2021

Respectfully submitted,

3 NATIONAL VETERANS LEGAL
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17 By: /s/ Barton F. Stichman (by permission)
18 Barton F. Stichman

19 *Attorneys for Plaintiffs*

20 DATED: May 12, 2021

21 U.S. DEPARTMENT OF JUSTICE

22 BRIAN M. BOYNTON
23 Acting Assistant Attorney General

24 LESLEY R. FARBY
25 Assistant Director
26 Federal Programs Branch

27 By: /s/ M. Andrew Zee
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36 *Attorneys for Defendant*

ATTESTATION

Pursuant to Local Rule 5-1(i)(3), I attest that I am the ECF user whose ID and password are being used in the electronic filing of this document. I further attest that I have obtained the concurrence in the filing of this document from the other signatory.

/s/ M. Andrew Zee
M. ANDREW ZEE

[PROPOSED] ORDER

Upon stipulation of the parties, and good cause appearing, the Court hereby orders:

3 1. The VA’s July 3, 2021 deadline set forth in the Court’s November 5, 2020 Order
4 to “issue . . . a replacement decision that determines: (a) whether the veteran served in the
5 territorial waters of the Republic of Vietnam during the war and, if so, (b) the amount of
6 retroactive compensation, if any, the veteran or the veteran’s survivor (or, if the veteran or
7 survivor is deceased, the estate of the deceased veteran or survivor) is entitled under the terms of
8 consent decree” for each of the veterans identified by the VA on March 5, 2021 is MODIFIED
9 and EXTENDED to November 30, 2022, under the conditions set forth below.

10 2. The VA shall, beginning July 30, 2021, and every three months thereafter,
11 provide to Class Counsel (a) a quarterly report on the replacement decisions issued since the
12 previous report, (b) the documents specified in paragraph 3 of the November 5, 2020 Order for
13 those replacements decisions, (c) a document listing the VA claims file number of those cases
14 listed in the quarterly report in which a VA notice letter was not sent because the VA did not
15 then possess a current address to which to mail the notice letter; (d) notice letters sent by the VA
16 after the last quarterly report because the VA obtained a current address to which to send the
17 notice letter; and (e) the information set forth in paragraph 5 below about payees whom the VA
18 has been unable to locate for purposes of making payment. The quarterly report shall include an
19 Excel spreadsheet containing, for each veteran for whom a replacement decision has been
20 issued, the following information:

21 a. The information for that veteran that was disclosed to Class Counsel on
22 March 5, 2021 (that is, the Social Security number of the veteran; the VA
23 claims file number; the last, first and middle name of the veteran; and the
24 date of the veteran's death, if applicable);

25 b. The effective date for disability or death benefits awarded in the
26 replacement decision based on a presumptive condition. In the event a
27 claim involves more than one presumptive condition, the VA will provide

one date—the earliest effective date for all presumptive conditions at issue in the claim;

- c. The full amount of the retroactive disability or death benefits awarded for any replacement decision that results in an increase in benefits award; and.

- d. The address to which the notice letter accompanying the replacement decision was sent, but only to the extent that the VA is able to populate the Excel spreadsheet on an automated, non-manual basis. The VA will investigate the feasibility of an automated process to include on the spreadsheets provided with each quarterly report a column containing the address(es) on each of the notice letters for the VA's replacement decisions. If the VA determines that an automated process is feasible, it will so advise Class Counsel and provide the address information with each quarterly report. If the VA determines that an automated process is not feasible, it will so advise Class Counsel. Class Counsel agrees to accept in good faith the VA's determination of feasibility. Regardless of the VA's determination, the VA will continue to provide copies of all notice letters for replacement decisions to Class Counsel to satisfy paragraph 3 of the Order.

20 3. When, pursuant to paragraph 3 of the November 5, 2020 Order, the VA provides
21 Class Counsel “with a copy of (a) all of the *Nehmer* readjudication decisions identified, (b) all of
22 the replacement decisions issued, and (c) each notice letter sent to the class members and coding
23 sheet associated with such replacement decisions,” ECF No. 492, it will provide PDF copies
24 with Optical Character Recognition (“OCR”) to the maximum extent feasible. While the VA
25 anticipates the very large majority of documents provided will be capable of OCR, it has
26 advised, and Plaintiffs have acknowledged, that a limited number of documents, primarily
27 historical documents—for example, prior adjudication decisions dating back several decades in
28 some cases—are unlikely to be capable of OCR.

1 4. The VA shall send to each adjudicator it assigns to prepare a replacement decision
 2 under the November 5, 2020 Order the operative guidance which the VA prepared in 2011 and
 3 included in its February 2012 and July 2016 revisions of the Nehmer Training Guide to
 4 implement Footnote 1 from the 1991 Final Stipulation and Order in this case. This guidance is
 5 currently referenced in the VA's Live Manual at Part IV, Subpart ii, Chapter 2, Section C, Topic
 6 4(d).

7 5. The VA shall continue its practice of providing Class Counsel with information
 8 about unlocated payees—*i.e.*, those payees whom the VA has been unable to locate for purposes
 9 of making payment—by providing with each quarterly report the following, to the extent
 10 applicable for an individual unlocated payee reported: VA claims file number; Social Security
 11 number; veteran's first name; veteran's last name; claimant's name (if different from veteran);
 12 undeliverable mail has been received; unable to identify a payee; unable to locate payee (payee
 13 identified, but no address available); type of mail returned (VCAA, rating, etc.);
 14 veteran/claimant's phone number; attempts made to obtain valid address; last known address;
 15 comments. By agreeing to provide this information to Class Counsel, the VA does not concede
 16 that any use of this information by Class Counsel to locate payees is compensable for purposes
 17 of any future request for attorney's fees and expenses.

18 6. On November 30, 2022, the VA shall provide an Undeliverable Report to Class
 19 Counsel. The Undeliverable Report shall contain the information set forth below for each payee
 20 to whom the VA has either sent a check or transferred money by direct deposit for the amount of
 21 retroactive compensation owed to the payee as a result of a replacement decision and the check
 22 was returned to the VA as undeliverable or the VA receives notice that the direct deposit failed.
 23 The Undeliverable Report will include VA claims file number, Social Security number;
 24 veteran's first name; veteran's last name; payee name; reason for payment return, payment
 25 amount returned, date of return, and address of payment (if sent by mail).

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3 PURSUANT TO STIPULATION, IT IS SO ORDERED.

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5 Dated: June 11, 2021

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WILLIAM ALSUP
United States District Court Judge